(1)

92-1358

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

DANIEL WILLIS, CAROLYN WILLIS, HERMAN MENSING, FRANCES MENSING, VINCENT LEWIS, RUBY LEWIS, ELWOOD HAMLET, AND LOIS HAMLET,

Petitioners,

v.

THE CELOTEX CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED

1. Does Section 105 of the United States Bankruptcy Code empower a bankruptcy judge to enjoin the enforcement under Fed.R.Civ.P. 65.1 of a supersedeas bond that had been posted by the debtor in a distant federal court more than a year before the debtor filed for bankruptcy, when the enforcement of the bond will not affect the bankruptcy estate?

LIST OF PARTIES

The parties to the proceeding below are identified in the caption to the case. Additionally, Aetna Life and Casualty Company should be identified as a *de facto* party in this proceeding. Although not formally named as a party in the proceedings below, *see* Fed.R.Civ.P. 65.1, Aetna Life & Casualty Company is the surety on the supersedeas bond posted by The Celotex Corporation that is at issue in this proceeding.

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To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Daniel and Carolyn Willis, Herman and Frances Mensing, Vincent and Ruby Lewis, and Elwood and Lois Hamlet, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit is reported at 978 F.2d 146 and may be found at App. 1. The order denying petitioners' timely petition for rehearing and suggestion for rehearing en banc may be found at App. 10. The Fourth Circuit's original opinion, which was vacated upon petitioners' petition for rehearing, has been withdrawn from publication but may be found at App. 12. The order granting the petition for rehearing of the Fourth Circuit's original opinion may be found at App. 34. The district court's order from which respondent took appeal is unpublished and may be found at App. 36.

JURISDICTION

The original judgment and opinion of the United States Court of Appeals for the Fourth Circuit was entered on June 18, 1992. The court of appeals withdrew its original judgment in response to petitioners' timely petition for rehearing, and issued its final judgment in an opinion entered on October 22, 1992. Petitioners filed a timely petition for rehearing of this judgment, which the court of appeals denied in an order entered on November 13, 1992.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The jurisdiction of the district court was properly invoked under 28 U.S.C. § 1332.

STATUTES AND RULES INVOLVED

11 U.S.C. § 105(a) provides, in pertinent part,

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Rule 62(d) of the Federal Rules of Civil Procedure provides,

> **Stay Upon Appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 65.1 of the Federal Rules of Civil Procedure provides, in pertinent part,

> Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

STATEMENT OF THE CASE

This case presents the questions of whether a supersedeas bond posted under Rule 62(d) of the Federal Rules of Civil Procedure provides meaningful or illusory protection to a judgment-winner pending appeal, and whether a bankruptcy court has the power to enjoin a judgment-winner from enforcing the judgment against a liable third party unrelated to the debtor-in-bankruptcy. It began, however, as a personal injury case filed in the United States District Court for the Eastern District of Virginia by six workers and their spouses (petitioners here[1]) who claimed that they had sustained personal injuries as a result of their exposure to asbestos-containing products manufactured by respondent The Celotex Corporation ("Celotex") and twelve other defendants. The workers settled with the other defendants and proceeded to trial against Celotex. After a four week trial, the jury returned a verdict in favor of four of the six workers and awarded them compensatory damages in the amount of $750,000.00, reduced by virtue of the workers' prior settlements with the other defendants to $525,000.00 The district court entered judgment on the verdict and denied Celotex's motion for new trial. To avoid execution of the judgment pending appeal, Celotex posted a supersedeas bond in the amount of $600,000.00 executed by Aetna Life & Casualty Company ("Aetna").

On appeal, Celotex argued that the judgment should be reversed because the district court had misapplied

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[1] Only four of the workers prevailed on their personal injury claims; these four workers and their spouses are the petitioners in this proceeding.

several provisions of Virginia substantive law. Celotex raised no federal or constitutional issues in the appeal. The United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment in a published opinion issued on June 15, 1990. *Willis v. Raymark Industries, Inc.*, 905 F.2d 793 (4th Cir. 1990). The Fourth Circuit denied Celotex's petition for rehearing on September 26, 1990. Pursuant to Fed.R.App.P. 41(a), the mandate of the court of appeals issued on October 3, 1990, making the judgment of the district court final and enforceable. Celotex did not file a motion to stay the mandate.

Recognizing that review of the judgment by the United States Supreme Court on writ of certiorari was unavailable because Celotex had raised no federal or constitutional issues and thus that the judgment was then immediately enforceable, counsel for the four victorious workers and their spouses demanded that Celotex pay the judgment in full. Counsel for Celotex agreed that his client would satisfy the judgment on or before October 12, 1990.

On October 12, 1990, Celotex filed a voluntary petition for reorganization pursuant to 11 U.S.C. § 101 *et seq.* in the United States Bankruptcy Court for the Middle District of Florida. Under 11 U.S.C. § 362(a), the filing of the bankruptcy petition had the immediate effect of staying all proceedings against Celotex. On October 17, 1990, the bankruptcy court entered an order noting the applicability of the automatic stay and purporting to enjoin, " 'among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds' posted by Celotex without the approval of the bankruptcy court." App. 5, quoting *In re Celotex Corp.*,

128 B.R. 478, 482 (Bankr.M.D.Fla. 1991). The bankruptcy court thus sought to enjoin not only actions against or affecting Celotex, but also actions against third parties (such as Aetna) that had guaranteed performance of Celotex's obligations upon Celotex's default.

On October 26, 1990, the four workers filed a motion in the district court in Virgina under Rule 65.1 of the Federal Rules of Civil Procedure to require Aetna to perform under the terms of the supersedeas bond that secured the judgment against Celotex, serving Aetna with the motion as the rule requires. The workers did not request that the court grant them any relief against Celotex. Celotex opposed the motion, arguing that Aetna's obligation to plaintiffs embodied in the supersedeas bond was actually an asset of Celotex's bankruptcy estate and thus that the workers' attempt to enforce the bond violated the automatic stay. Celotex also argued that the bankruptcy court had enjoined judgment creditors from enforcing surety obligations of third parties, and that the bankruptcy court had the power to issue this injunction under 11 U.S.C. § 105(a) even absent any showing that enforcement of the obligation would directly affect Celotex's bankruptcy estate. The workers replied that they did not request that the court grant them any relief against Celotex; that once the judgment became enforceable, Celotex could not claim any property interest in the supersedeas bond; and that enforcement of the bond would not create a new liability in Celotex, but would merely transfer Celotex's liability on the judgment from the workers to Aetna. The workers also pointed out that the very purpose of a supersedeas bond is to protect the judgment creditor from the future insolvency of the judgment

debtor, and that to allow the enforcement of supersedeas bonds to be stayed during the bankruptcy of the judgment debtor would reduce the protection that supersedeas bonds afford to a nullity.

The district court granted the workers' Rule 65.1 motion, and ordered Aetna to perform under the terms of the supersedeas bond. On appeal, the Fourth Circuit vacated the order and remanded the case "for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay." App. 9. The Fourth Circuit rejected Celotex's contention that the motion to enforce the bond was essentially a proceeding "against the debtor" within the meaning of § 362(a)(1), observing that the terms of the bond "impose a duty on Aetna separate from and independent of Celotex's duty to pay the judgments," and thus that "Aetna does not hold an identity of interest with Celotex." App. 6. The Fourth Circuit also dismissed Celotex's contention that the supersedeas bond was an asset of Celotex's bankruptcy estate, noting that "our mandate issued prior to Celotex's bankruptcy filing, thus extinguishing any interest Celotex may have had in the bond." App. 7. The court agreed with Celotex, though, that the bankruptcy court had the power to enjoin the workers' proceeding to enforce the bond, even though Celotex had no property interest in the bond, under its broad equitable powers to promote the resolution of bankruptcies conferred by 11 U.S.C. § 105(a). App. 7-9. The court reached this conclusion based on its conclusory observation that "immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization." App. 9. The court suggested that protection of assets in

which Celotex had no property interest would somehow enable the bankruptcy court "to take control of the immense litigation" involving asbestos facing Celotex, and would allow the bankruptcy court "to examine the underlying tort judgments to establish whether any portion of the awards was voidable." App. 9. The court never explained how a judgment entered almost two years before a bankruptcy would be voidable, or why this would even matter if the judgment were to be enforced against assets in which Celotex no longer had a property interest.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Holding Undermines the Very Purpose of Supersedeas Bonds, and Threatens To Throw Post-Judgment Proceedings in the Federal Courts into a State of Chaos.

A supersedeas bond protects a judgment creditor against the risk of the judgment debtor's future insolvency – but only so long as the judgment debtor does not become insolvent. If the judgment debtor becomes insolvent and files for protection under the Bankruptcy Code, then the supersedeas bond cannot be enforced, even on an affirmed, mature judgment, unless and until the bankruptcy judge says it can be enforced – which may not occur until confirmation of the bankruptcy plan, years and years and years later.

Willis v. Celotex Corp., 978 F.2d 146 (4th Cir. 1992) (holding paraphrased).[2]

Under the Federal Rules of Civil Procedure, a money judgment is immediately enforceable by the judgment-winner, subject to the right of the judgment-loser to obtain a stay of execution by posting a supersedeas bond. Fed.R.Civ.P. 62(d); *see BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 616 (7th Cir. 1992). If the judgment-loser posts a supersedeas bond under Rule 62(d), the judgment-winner must forego immediate execution, but in return is assured that if the judgment is affirmed the judgment will be paid regardless of what happens to the judgment-loser. "The function of a supersedeas bond is to protect the judgment creditor's position from erosion during any period that its right to execute is obstructed by a stay pending appeal – erosion that could occur if the creditor's position takes a turn for the worse or the creditor puts assets beyond the debtor's reach." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786

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[2] *Cf.* Joseph Heller, *Catch-22* (Simon & Schuster 1961), at 46:
There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
'That's some catch, that Catch-22,' he observed.
'It's the best there is,' Doc Daneeka agreed.

F.2d 794, 800 (7th Cir. 1986) (Easterbrook, J., concurring); *see also Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 227 (10th Cir. 1987), describing the rationale for the bond requirement as the intention "to secure the judgment through the appeal process against the possibility of the judgment debtor's insolvency." Rule 62(d) thus balances the judgment-winner's interest in being paid promptly against the judgment-loser's interest in preserving the status quo until the judgment survives appeal. The judgment-winner gives up prompt payment of the judgment but is promised certainty of payment if the judgment is affirmed; the judgment-loser avoids immediate enforcement of the judgment but must give adequate security to guarantee payment of the judgment if it survives appeal.

The Fourth Circuit's decision in the instant case disrupts the delicate balance of interests achieved in Rule 62(d). While petitioners were forced to forego immediate execution on their judgment, they have been deprived by the Fourth Circuit's holding of their right to payment of the judgment by a solvent entity (Aetna) which promised to pay the judgment if Celotex were unable to do so. Under the Fourth Circuit's reasoning, a supersedeas bond provides virtually no assurance that a judgment-winner will be promptly paid in the event of a judgment-loser's later insolvency. Neither the drafters of Rules 62(d) and 65.1, nor Congress in enacting the Bankruptcy Code, could have intended such a cynical and unfair result.

Importantly, petitioners are not the only ones harmed by the Fourth Circuit's decision. It is apparent from the district court's order allowing petitioners to enforce the supersedeas bond that the court never would have approved the bond in this case had it believed that the

bond provided petitioners with less than absolute protection against the possibility of Celotex's insolvency. The Fourth Circuit's opinion in this case may prompt federal trial courts (and state courts as well) to refuse to approve supersedeas bonds unless they are obtained through payment of a flat, non-refundable fee and are unsecured, to obviate any possible argument that execution on the bond following a completed appeal will somehow "affect" the judgment-loser's bankruptcy estate. This will inflate the cost of supersedeas bonds dramatically, and may even discourage the use by courts of Rule 62(d) (and its state counterparts) to stay judgments. *See Grubb v. Federal Deposit Ins. Corp., supra* 833 F.2d at 227 n.3, noting that if enforcement of supersedeas bonds were stayed by bankruptcy,

> trial courts would not grant stays of execution to potentially insolvent national banks, because any supersedeas bond posted by such a bank would not serve the purpose for which these bonds are intended. Instead, the bank would be forced to pay trial court judgments immediately, possibly driving them further toward insolvency.

Alternatively, trial courts would be forced to require that supersedeas bonds bear interest to reflect not only the expected duration of the appeal, but also the time that the judgment may be uncollectible due to bankruptcy proceedings. Thus, both judgment-winners and judgment-losers will suffer.

The Fourth Circuit's opinion in this case will inevitably generate confusion in the courts concerning the scope of protection that must be afforded by a supersedeas

bond in order entitle a judgment-loser to a stay under Rule 62(d). It will also engender unpredictable treatment of similarly situated judgment winners and losers in the courts of this country. This Court should act promptly to prevent unnecessary chaos in the federal and state courts by reviewing the Fourth Circuit's decision in this case.

II. The Fourth Circuit's Holding That Bankruptcy Courts Have Virtually Limitless Power To Facilitate Complex Reorganizations Is Without Precedent, May Have Broad Ramifications, and Ought To Be Reviewed by This Court.

The Fourth Circuit ruled that the bankruptcy court in Florida had the power to enjoin the release of a supersedeas bond by a United States District Court in Virginia under its authority conferred by 11 U.S.C. § 105(a) "to carry out the provisions of" the Bankruptcy Code. App. 7-9. This Court has recognized, however, that any actions taken by a bankruptcy court under this provision to promote an equitable reorganization must be consistent with the law applicable to the affected claims as well as with the substantive provisions of the Bankruptcy Code itself. *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 550 (1990); *see also In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Co., Debtor*, 791 F.2d 524, 528 (7th Cir. 1986) ("the fact that [bankruptcy proceedings are] equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views might be").

Unfortunately, the bankruptcy court's injunction prohibiting enforcement of supersedeas bonds securing judgments that have been affirmed on appeal directly conflicts with at least two provisions governing such claims: Fed.R.Civ.P. 65.1, which allows the enforcement of supersedeas bonds on motion without filing a new action against the surety, and 11 U.S.C. § 524(e), which provides that "the discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." While it is true that the bankruptcy court's injunction does not purport to discharge claims on supersedeas bonds, but instead stays enforcement of the bonds indefinitely, this distinction does not save the injunction. In *In re Rohnert Park Auto Parts, Inc.*, 113 B.R. 610 (Bankr. 9th Cir. 1990), the Ninth Circuit Bankruptcy Appellate Panel concluded that a similar injunction prohibiting the enforcement of claims against co-obligors of the bankrupt ran afoul of § 524(e), in language directly applicable in the case at bar.

> Although the bankruptcy court did not release the co-debtors from liability, the stay . . . does affect the liability of the co-debtors. . . . [The creditor] is prohibited from proceeding against the co-debtors until the plan is completed. This affects the liability of the co-debtors for five years. . . . [This] does not comply with § 524(e) of the Bankruptcy Code.

113 B.R. at 616. Because the bankruptcy court's injunction, on its face, promotes a result not only unauthorized, but actually prohibited, by the Bankruptcy Code, § 105(a) cannot support the bankruptcy court's interference with the Virginia district court's enforcement of Aetna's obligation on the supersedeas bond.

It is true, as the Fourth Circuit's opinion points out, that the courts have recognized the authority of a bankruptcy court under § 105(a) to enjoin an action against a third party when the court finds "that failure to enjoin 'would effect [sic] the bankruptcy estate and would adversely or detrimentally influence or pressure the debtor through the third party.' " App. 7, quoting *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1003 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) and *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.)*, 25 B.R. 1018, 1020 (D.N.M. 1982). But such a finding would be inconceivable in the instant case for two reasons, one of which is acknowledged by the Fourth Circuit in its opinion. First, Aetna possesses no property of Celotex and could not satisfy its obligation to plaintiffs with any property in which Celotex has an interest. App. 4 n.3. Therefore, the satisfaction of Aetna's liability to petitions would not itself affect Celotex's bankruptcy estate; at most, it would merely transfer petitioners' claim against Celotex to Aetna. Second, Aetna's liability to petitions is something that Celotex will *never* be able to change. 11 U.S.C. § 524(e). Delaying enforcement of Aetna's obligation to plaintiffs will not assist the formulation of Celotex's plan of reorganization, because 11 U.S.C. § 524(e) guarantees that petitioners' rights against Aetna can never be impaired or reduced. Because of § 524(e), the stay cannot aid reorganization in any legitimate way. Thus, the stay, on its face, did not promote Celotex's ability to formulate a plan of reorganization, and did not prevent the district court from allowing petitioners to recover from Aetna on the supersedeas bond.

The stay does, however, aid Celotex's reorganization in an illegitimate way. Petitioners and other judgment creditors with supersedeas bonds should never have to accept less than the full amount that Celotex's sureties are obligated to pay under the bonds. But time is of the essence to these creditors; many of them are disabled or dying as a result of Celotex's tortious conduct. The delay itself may force these creditors to accept less on their bonds in a plan of reorganization than they are entitled to receive. A stay on enforcement of supersedeas bonds is nothing short of extortion. By recognizing the stay as a proper exercise of the bankruptcy court's § 105(a) powers, the Fourth Circuit has condoned this practice. This Court should grant certiorari to insure that § 105(a) will not be abused in this manner.

In its opinion, the Fourth Circuit concedes that proceedings against a surety to enforce a supersedeas bond securing a judgment owed by a defendant in bankruptcy would ordinarily be outside the control of the bankruptcy court because such proceedings would not affect reorganization. App. 8-9. But the court proceeds to suggest that Celotex's bankruptcy is somehow extraordinary in a way that makes a stay on enforcement of supersedeas bonds helpful. App. 9. Citing the bankruptcy court's opinion supporting its § 105(a) stay order, the court identifies the number of asbestos-related personal injury claims pending against Celotex (over 141,000) and the amount of supersedeas bonds posted by Celotex (nearly $70 million) as factors necessitating the stay. App. 8. The stay was required, the court concludes, "to permit the bankruptcy court to take control of the immense litigation and to examine the underlying tort judgments to establish

whether any portion of the awards was voidable." App. 9.

But the Fourth Circuit does not, and cannot, explain how a stay on enforcement of a supersedeas bond securing a judgment *from which all appeals have been exhausted* would allow the bankruptcy court to "take control" of litigation involving Celotex. Indeed, petitioners' action does not involve Celotex; it involves strictly a claim on a court-approved surety agreement. The number of personal injury cases pending against Celotex, or the total amount of supersedeas bonds that it posted, could not conceivably affect petitioners' ultimate right to recover on the supersedeas bond. Most alarming is the Fourth Circuit's suggestion that the bankruptcy court may reexamine Celotex's underlying liability to petitioners to determine whether any portion of the award is "voidable." Celotex's liability to petitioners has already been conclusively affirmed by the Fourth Circuit in a judgment entered more than two years ago. Nothing in the Bankruptcy Code authorizes the bankruptcy court to sit in judgment over the rulings of a circuit court of appeals. The bankruptcy court may evaluate, and adjust, Celotex's liability to Aetna. It cannot question Celotex's liability to petitioners, or Aetna's liability to petitioners under the supersedeas bond.

The bankruptcy court had no jurisdiction or power to prevent petitioners from proceeding against the supersedeas bond in this case. The district court's order allowing petitioners to execute on the bond neither affected the size of Celotex's bankruptcy estate nor drew Celotex

inexorably into litigation. The Fourth Circuit's interpretation of § 105(a) to validate the bankruptcy court's imperious effort to force petitioners to sacrifice their undeniable rights under the bond is both wrong and dangerous. It should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

DANIEL A. WILLIS; CAROLYN W. WILLIS; HERMAN L. MENSING, JR.; FRANCES K. MENSING; VINCENT H. LEWIS; RUBY B. LEWIS; ELWOOD F. HAMLET; LOIS D. HAMLET, *Plaintiffs-Appellees,* and RICHARD L. TAYLOR; MARY S. TAYLOR; WILLIAM F. COBB; LILLIE P. COBB; ROY B. BASS; SUSAN R. BASS, *Plaintiffs,* v. THE CELOTEX CORPORATION, *Defendant-Appellant,* and OWENS-CORNING FIBERGLASS CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; GAF CORPORATION; KEENE CORPORATION; STANDARD INSULATIONS, INC.; RAYMARK INDUSTRIES, INC.; OWENS-ILLINOIS, INC.; H.K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION; CROWN CORK & SEAL COMPANY, INC.; COMBUSTION ENGINEERING, INC.; PITTSBURGH CORNING CORPORATION, *Defendants.*	)	No. 91-1446

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.
(CA-87-645-N)

Argued: October 28, 1991
Decided: October 22, 1992

Before RUSSELL and WILKINS, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge Wilkins wrote the opinion, in which Judge Russell and Senior Judge Ward joined.

COUNSEL

ARGUED: Jeffrey Wayne Warren, BUSH, ROSS, GARDNER, WARREN & RUDY, P.A., Tampa, Florida, for Appellant. Brent Marcus Rosenthal, BARON & BUDD, P.C., Dallas, Texas, for Appellees. **ON BRIEF:** Wendy V.E. England, BUSH, ROSS, GARDNER, WARREN & RUDY, P.A., Tampa, Florida, for Appellant. Jonathan A. Smith-George, PATTEN, WORNOM & WATKINS, Newport News, Virginia, for Appellees.

OPINION

WILKINS, Circuit Judge:

The Celotex Corporation (Celotex) appeals an order of the district court directing The Aetna Casualty &

Surety Company (Aetna) to perform as surety on a supersedeas bond posted by Celotex to secure, pending appeal, the payment of judgments entered by the district court against Celotex following a jury verdict in favor of the plaintiffs (Willis). Celotex maintains that the district court erred in permitting execution against Aetna because proceedings to enforce payment against the surety on the bond were stayed following Celotex's Chapter 11 bankruptcy filing under the automatic stay provisions of 11 U.S.C.A. § 362(a)(1), (3) (West Supp. 1992) or, alternatively, under an order of the United States Bankruptcy Court for the Middle District of Florida entered in Celotex's bankruptcy proceedings pursuant to 11 U.S.C.A. § 105(A) (West Supp. 1992). The extraordinary facts presented by the Celotex bankruptcy lead us to conclude that the stay of proceedings against third-party sureties to enforce payment on supersedeas bonds by the bankruptcy court was a proper exercise of its authority under § 105(a). Consequently, we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the stay.

I.

In February 1989, the United States District Court for the Eastern District of Virginia entered amended judgments totalling $526,500 in favor of Willis and against Celotex for Willis' asbestos-related injuries. Celotex posted a supersedeas bond in the amount of $600,000,

with Aetna serving as surety on the bond, to stay execution of the judgments pending Celotex's appeal.[1] *See* Fed. R. Civ. P. 62(d). To obtain Aetna's participation as surety, Celotex purchased certificates of deposit that it pledged to First Florida Bank, N.A. The bank then issued an irrevocable letter of credit[2] in favor of Aetna upon which Aetna could draw in the event it was required to pay on the supersedeas bond.[3]

This court affirmed the judgments against Celotex in June 1990, and our mandate issued on October 3, 1990. Nine days later Celotex and its wholly-owned subsidiary

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[1] At oral argument we requested information concerning the structure of the financial arrangements between Celotex and Aetna. Willis subsequently moved to strike Celotex's response to our request. This motion is denied.

[2] This financial arrangement appears to be relatively common. *See e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 787 F.2d 794, 800-03 (7th Cir. 1986) (Easterbrook, J., concurring); *see generally Cargill, Inc. v. Sunlight Foods, Inc.*, 586 So. 2d 366, 367-68 (Fla. Dist. Ct. App. 1991).

[3] If Aetna were to satisfy Willis' judgments, it could not do so with Celotex's assets because it does not hold Celotex's assets. Instead, it would compensate Willis with its own funds, then immediately draw on the irrevocable letter of credit. Section 362 would not stay Aetna from proceeding against the letter of credit. The letter of credit issued by the bank and its proceeds are not part of Celotex's bankruptcy estate, and the obligation of the bank under the irrevocable letter of credit is completely independent of any obligations between Aetna and Celotex. *See Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820, 828 (Bankr. N.D. Tex. 1992); *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 589-90 (1987), *reh'g on other grounds*, 835 F.2d 584 (5th Cir. 1988); *In re M.J. Sales & Distrib. Co.*, 25 B.R. 608, 614 (Bankr. S.D.N.Y. 1982).

filed petitions for relief under Chapter 11 of the Bankruptcy Code, *see* 11 U.S.C.A. § 1101, *et seq.* (West 1979 & Supp. 1992), in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, the bankruptcy court entered an order seeking to augment the automatic stay protection afforded to Celotex under § 362(a) and "precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds" posted by Celotex without the approval of the bankruptcy court. *In re Celotex Corp.*, 128 B.R. 478, 482 (Bankr. M.D. Fla. 1991).

On October 26, 1990, Willis informed the district court that Celotex had not paid the judgments and sought to execute against Aetna as surety on the supersedeas bond, *See* Fed. R. Civ. P. 65.1. Relying primarily upon *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643-44 (3d Cir. 1975), the district court determined that the supersedeas bond was not part of the Celotex bankruptcy estate over which the bankruptcy court possessed exclusive jurisdiction and, consequently, ordered the proceeds of the supersedeas bond disbursed to Willis. Celotex appeals this decision.

II.

Celotex contends that 11 U.S.C.A.§ 362(a)(1) and (3)[4] stayed proceedings against Aetna because it has an

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[4] This section provides in pertinent part:

[A] petition filed under [Chapter 11] . . . operates as a stay, applicable to all entities, of –

(1) The commencement or continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the case under this title, or to recover a claim against the

identity of interest with Celotex such that a proceeding against Aetna is, in effect, a proceeding against Celotex, *see A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 999-1002 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), and because the supersedeas bond is an asset of the bankruptcy estate. These arguments lack merit.

The terms of the supersedeas bond impose a duty on Aetna separate from and independent of Celotex's duty to pay the judgments. Aetna does not hold an identity of interest with Celotex. *See Washburn & Kemp, P.C. v. Committee of Dalkon Shield Claimants (In re A.H. Robins Co.)*, 846 F.2d 267, 271 (4th Cir. 1988) (distinguishing *Piccinin* and holding that unique circumstances essential to make a § 362(a) stay effective as to a third party do not exist if outsider third party owes independent contractual duty to creditor). Proceedings against Aetna as surety on the supersedeas bond, therefore, were not stayed under § 362(a)(1).

This court has not previously addressed whether a supersedeas bond is an asset of the bankruptcy estate. While there is considerable disagreement concerning this issue, *see In re Southmark Corp.*, 138 B.R. at 827-28; *compare Mid-Jersey Nat'l Bank*, 518 F.2d at 643-44 *with Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1032-36 (3d Cir. 1991),

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debtor that arose before the commencement of the case under this title;

. . . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C.A. § 362(a)(1), (3).

we need not address this question. Assuming a supersedeas bond is an asset of the bankruptcy estate during the pendency of an appeal, here the appeal was decided unfavorably to Celotex and our mandate issued prior to Celotex's bankruptcy filing, thus extinguishing any interest Celotex may have had in the bond. Accordingly, proceedings against the bond were not proceedings "to obtain possession of property of the estate" and were not stayed by § 362(a)(3). 11 U.S.C.A. § 362(a)(3).

III.

Next we consider whether the order of the bankruptcy court properly stayed execution against the surety of the supersedeas bond pursuant to 11 U.S.C.A. § 105(a). This section permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C.A. § 105(a). We have held that a bankruptcy court may properly exercise its authority under § 105(a) to enjoin an action against a third party when the court finds " 'that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party.' " *Picinin*, 788 F.2d at 1003 (quoting *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.)*, 25 B.R. 1018, 1020 (D.N.M. 1982)). Additionally, the bankruptcy court may " 'enjoin a variety of proceedings . . . which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan.' " *Id.* (quoting *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 40 B.R. 219, 226 (S.D.N.Y. 1984)).

In support of the § 105(a) order, the bankruptcy court detailed the magnitude of the task it faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted. *In re Celotex Corp.*, 128 B.R. 478, 482-83 (Bankr. M.D. Fla. 1991). As of the bankruptcy filing, over 141,000 asbestos-related personal injury actions were pending against Celotex in federal and state jurisdictions nationwide; because at least 100 such cases were then on appeal, Celotex had posted supersedeas bonds totalling nearly $70 million to stay execution of the judgments pending conclusion of the appellate processes. *Id.* Stressing that its power in the initial stages of the bankruptcy filing to deal with this complex litigation must be absolute, and noting that an opportunity to evaluate the underlying tort judgments secured by the supersedeas bonds to ascertain whether any portion of the judgments were voidable would be required, the bankruptcy court concluded that a race to the courthouse by those insured by supersedeas bonds would impose a burden on the reorganization process. *Id.* at 483-84. The court made clear, however, that once a judgment creditor had successfully completed the appellate process, the propriety of lifting the stay of proceedings against the supersedeas bonds would be reexamined. *Id.* at 484.[5].

While in the usual bankruptcy filing, third-party payments on a supersedeas bond securing a judgment owed

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[5] Because Willis has already successfully completed the appellate process, we assume that once the bankruptcy court has had an opportunity to evaluate whether any portion of Willis' judgment is voidable, it will lift the stay.

by the bankrupt would not affect reorganization, Celotex's is not the usual bankruptcy. We agree with the bankruptcy court that immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization. A hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation and to examine the underlying tort judgments to establish whether any portion of the awards was voidable. Consequently, the bankruptcy court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under § 105(a). Thus, we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay.

VACATED AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

November 13, 1992

No. 91-1446

DANIEL A WILLIS; CAROLYN W. WILLIS; HERMAN L. MENSING, JR.; FRANCES K. MENSING; VINCENT H. LEWIS; RUBY B. LEWIS; ELWOOD F. HAMLET; LOIS D. HAMLET

Plaintiffs – Appellees

and

RICHARD L. TAYLOR; MARY S. TAYLOR; WILLIAM F. COBB; LILLIE P. COBB; ROY B. BASS; SUSAN R. BASS

Plaintiffs

v.

THE CELOTEX CORPORATION

Defendant – Appellant

and

OWENS-CORNING FIBERGLASS CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; GAF CORPORATION; KEENE CORPORATION; STANDARD INSULATIONS, INC.; RAYMARK INDUSTRIES, INC.; OWENS-ILLINOIS, INC.; H.K. PORTER COMPANY, INC.; FIBERBOARD CORPORATION; CROWN CORK & SEAL COMPANY, INC.; COMBUSTION ENGINEERING, INC.; PITTSBURGH CORNING CORPORATION

Defendants

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellees filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Russell and Judge Ward, Senior District Court Judge, sitting by designation.

For the Court,
/s/ Bert M. Montague
CLERK

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL A. WILLIS; CAROLYN W. WILLIS; HERMAN L. MENSING, JR.; FRANCES K. MENSING; VINCENT H. LEWIS; RUBY B. LEWIS; ELWOOD F. HAMLET; LOIS D. HAMLET,

Plaintiffs-Appellees,

and

RICHARD L. TAYLOR; MARY S. TAYLOR; WILLIAM F. COBB; LILLIE P. COBB; ROY B. BASS; SUSAN R. BASS,

Plaintiffs,

v.

THE CELOTEX CORPORATION,

Defendant-Appellant,

and

OWENS-CORNING FIBERGLASS CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; GAF CORPORATION; KEENE CORPORATION; STANDARD INSULATIONS, INC.; RAYMARK INDUSTRIES, INC.; OWENS-ILLINOIS, INC.; H. K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION; CROWN CORK & SEAL COMPANY, INC.; COMBUSTION ENGINEERING, INC.; PITTSBURGH CORNING CORPORATION,

Defendants.

No. 91-1446

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.
(CA-87-645-N)

Argued: October 28, 1991

Decided: June 18, 1992

Before RUSSELL and WILKINS, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge Russell wrote the majority opinion, in which Senior Judge Ward joined. Judge Wilkins wrote a concurring opinion.

COUNSEL

ARGUED: Jeffrey Wayne Warren, BUSH, ROSS, GARDNER, WARREN & RUDY, P.A., Tampa, Florida, for Appellant. Brent Marcus Rosenthal, BARON & BUDD, P.C., Dallas, Texas, for Appellees. **ON BRIEF:** Wendy V. E. England, BUSH, ROSS, GARDNER, WARREN & RUDY, P.A., Tampa, Florida, for Appellant. Jonathan A. Smith-George, PATTEN, WORNOM & WATKINS, Newport News, Virginia, for Appellees.

OPINION

RUSSELL, Circuit Judge:

This appeal presents a relatively simple issue: When a judgment debtor posts a supersedeas bond pending appeal, and the judgment debtor provides its surety with

collateral to secure the surety's obligation on the supersedeas bond, is that collateral property of the judgment debtor's bankruptcy estate where the judgment debtor files a petition under Chapter 11 of the Bankruptcy Code after the judgment debtor loses on appeal but before judgment creditor collects the judgment? We hold that such collateral is the property of the judgment debtor's bankruptcy estate over which the bankruptcy court possesses exclusive jurisdiction.

I.

On February 1, 1989, the United States District Court for the Eastern District of Virginia (the "district court") entered amended judgments totalling $526,500 for the Willis Appellees, plaintiffs below, against the Appellant Celotex Corporation ("Celotex") for asbestos-related injuries. On March 13, 1989, Celotex posted a supersedeas bond in the amount of $600,000, with Aetna Casualty & Surety Company ("Aetna") serving as surety on the bond, to stay execution of the judgments pending appeal. Celotex's surety agreement with Aetna[1] allowed Celotex to

[1] At oral argument on October 28, 1991, the United States Court of Appeals for the Fourth Circuit requested detailed information regarding the collateral which Celotex provided to induce Aetna to execute the supersedeas bond securing the Willis plaintiffs' judgments. Celotex responded to this request with documentation of the surety agreement and arrangements between Celotex and Aetna for the posting of the supersedeas bond at issue here. (Borreca Aff., Exs. A – E [filed Nov. 5, 1991].) Appellees subsequently filed a motion to strike Celotex's response to this court's request. Appellee's Mot. to Strike (filed Nov. 6, 1991). The court denies Appellee's Motion to Strike.

post supersedeas bonds on the condition that Celotex furnish collateral to Aetna in the form of irrevocable letters of credit[2] benefitting Aetna in amounts equal to or greater than 100 percent of any outstanding supersedeas bonds. First Florida Bank, N.A., issued the letters of credit in favor of Aetna[3] based on Celotex's pledge to the

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[2] An irrevocable letter of credit is a specialized document providing a simple, reliable mechanism for payment of funds in commercial transactions. In general, once the beneficiary receives an irrevocable letter of credit, the letter is irrevocably established and may not be revoked without the beneficiary's consent. The beneficiary is entitled to be paid promptly upon presentation to the bank of the documents described in the letter of credit. The bank's function has been described as purely ministerial, and the bank's obligation to its customer does not include liability or responsibility for performance of the underlying transaction between the bank's customer and the beneficiary. Rather, the bank's duty is normally limited to placing the required documents next to the letter of credit to determine whether they coincide. *See, e.g., Cargill, Inc. v. Sunlight Foods, Inc.*, 586 So.2d 366, 367-68 (Fla. Dist. Ct. App. 1991).

[3] The letters of credit issues to Aetna provided,

> Any draft(s) drawn by you under this Letter of Credit shall be accompanied by your written certification that you, as Surety, have executed or procured the execution of bonds . . . or other instrument(s) of suretyship at the request of The Celotex Corporation . . . and that either of the following alternatives exists: (a) Claim(s) have been or may be made thereunder and that in your sole judgment as Surety the funds represented by your drafts are required for your protection. . . . (b) Our notice of election not to renew has been received and that you have not been released from liability under the bond(s) . . . and the proceeds of your drafts will be held by you as collateral against loss. . . .

(Borreca Aff., Exs. D, E.)

bank of certificates of deposit which Celotex purchased in amounts equal to or greater than the face amounts of the letters of credit. Celotex purchased the certificates of deposit which were pledged to First Florida Bank with the proceeds of insurance policies covering asbestos-related claims against Celotex. The purpose of this surety agreement was to allow Aetna, if required to pay on a supersedeas bond obligation, to reimburse itself by drawing a commensurate sum from the irrevocable letters of credit.

On June 15, 1990, the United States Court of Appeals for the Fourth Circuit affirmed the district court judgments against Celotex. Mandate issued October 3, 1990. On October 12, nine days after mandate issued, Celotex and its wholly-owned subsidiary filed petitions for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Middle District of Florida (the "bankruptcy court").[4]

On Appellant Celotex's Motion for Extension of § 362 Stay to Pending Matters, the bankruptcy court on October

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[4] As of bankruptcy filing, over 141,000 asbestos-related personal injury cases were pending against Celotex in federal and state jurisdictions nationwide. Moreover, because at least 100 such asbestos-related cases were then on appeal, Celotex had posted supersedeas bonds totalling nearly $70 million to stay execution of the judgments pending conclusion of the appellate processes. All supersedeas bonds were secured by property of Celotex's estate. *See In Re Celotex Corp.*, 128 B.R. 478, 482-83 (Bankr. M.D. Fla. 1991).

17, 1990 entered an order pursuant to 11 U.S.C. §§ 105[5] and 362[6] which, *inter alia*, enjoined all entities from

> [e]nforcing, against . . . the Debtor[] or against property of . . . the Debtor[], a judgment obtained before the commencement of the Chapter 11 cases;
>
> . . . .

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[5] Section 105 provides,

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent abuse of process.

11 U.S.C. § 105(a) (1988).

[6] Section 362(a) provides in pertinent part:

[A] petition filed [in Chapter 11 bankruptcy] operates as a stay, applicable to all entities, of –

> (1) the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was . . . commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> . . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . .

11 U.S.C. § 362(a) (1988).

> Taking any act to create, perfect or enforce against property of . . . the Debtor[], any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;
>
> Taking any act to collect, assess, or recover a claim against . . . the Debtor[] that arose before the commencement of the Chapter 11 cases.

(J.A. at 66.)

However, on October 26, 1990, the Willis plaintiffs filed with the district court a Motion for Release of Supersedeas Bond pursuant to Fed. R. Civ. P. 65.1,[7] stating, "Celotex has failed to pay the plaintiffs' judgments, and the Court should release the full security provided by the Supersedeas Bond. . . . " (J.A. at 22.) The Willis plaintiffs' Rule 65.1 motion named Celotex, not Aetna, as the party defendant, and moved the court "for release of the proceeds of the Supersedeas Bond posted by the defendant Celotex Corporation in this action." (J.A. at 21, 23.)

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[7] Rule 65.1 provides in pertinent part,

Security: Proceedings Against Sureties

> Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

Fed. R. Civ. P. 65.1.

Relying primarily upon *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643-44 (3d Cir. 1975),[8] the district court determined that a "supersedeas bond or *other security* posted pre-petition by the debtor" was not part of the Celotex bankruptcy estate over which the bankruptcy court possessed exclusive jurisdiction. (J.A. at 52; emphasis added.) On January 2, 1991, the district court therefore granted the Willis plaintiffs' Rule 65.1 motion, rejecting Celotex's assertion that the automatic stay of "11 U.S.C. § 362[] precludes the motion for release of the proceeds of the bond in this Court," and ordered the Defendant Celotex to "release of the proceeds of the supersedeas bond" to the Willis plaintiffs. (J.A. at 50, 55 [quoting *Willis v. Celotex Corp.*, No. 87-645-N, slip op. at 4, 9 (E.D. Va. Jan. 2, 1991)].)

Celotex appeals the district court order granting release of the supersedeas bond proceeds to the Willis plaintiffs; Aetna does not. We conclude that the district court erred in granting the Willis plaintiffs' Rule 65.1 motion.

II.

Judge Posner observed, "The supersedeas bond merely gives the judgment creditor another debtor to go after – the insurance company – once execution of the judgment is possible. It is not a release of the judgment

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[8] Subsequent to the district court's decision, the Third Circuit determined, "*Mid-Jersey's* analysis of the automatic stay [of 11 U.S.C. § 362] is inapplicable to the current Bankruptcy Code." *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1035 (3d Cir. 1991).

debtor. [The judgment debtor] remains fully liable; it is just that [the insurance company] is liable too." *Sheldon v. Munford*, 902 F.2d 7, 8 (7th Cir. 1990). As other courts have noted, the summary procedure provided in Rule 65.1 for collecting the security on a judgment "is applicable to a principal as well as a surety on a [supersedeas] bond." *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986) [citing *Coyne Delaney Co. v. Capital Dev. Bd.*, 717 F.2d 385, 391 (7th Cir. 1983]). Here, the captions of both the Willis plaintiffs' Rule 65.1 motion and the January 2 district court order granting that motion named Celotex as the party defendant. These headings show that the Willis plaintiffs sought, and the district court issued, an order directing the principal, Defendant Celotex, not the surety Aetna, to pay the judgment. Moreover, the language of both the Rule 65.1 motion and the January 2 court order refers to the "release of the proceeds of the supersedeas bond" posted by the Defendant Celotex, (J.A. at 23, 55) indicating that Celotex was to pay the judgment by releasing to the Willis plaintiffs the collateral which Celotex had furnished Aetna under the surety agreement.

The filing of a petition under Chapter 11 of the Bankruptcy Code creates an estate in bankruptcy, comprised of the debtor's property, wherever located and by whomever held, 11 U.S.C. § 541(a) (1988), over which the bankruptcy court may exercise exclusive jurisdiction. *E.g., MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91 (2d Cir.) (citing 28 U.S.C.A. § 1334(d) [West Supp. 1987]), *cert. denied*, 488 U.S. 868 (1988). Upon Celotex's October 12, 1990 Chapter 11 filing, the Celotex estate in bankruptcy was created, *see, e.g., Cross Elec. Co. v. United*

States, 664 F.2d 1218, 1219 (4th Cir. 1981), and the United States Bankruptcy Court for the Middle District of Florida assumed jurisdiction over property therein. The Bankruptcy Code provides that "all legal or equitable interests of the debtor in property as of the commencement of the case" are the property of the bankruptcy estate. 11 U.S.C. § 541(a)(1) (1988). This provision is to be "construed expansively." *MacArthur*, 837 F.2d at 92. Moreover, as one bankruptcy court noted, "one must remember the dichotomy between the supersedeas bond and the surety agreement and collateral securing the bond. . . . *The latter two are the property of the [bankruptcy] estate.*" *In Re Celotex Corp.*, 128 B.R. 478, 481 (Bankr. M.D. Fla. 1991) (emphasis added). We view the assets which Celotex furnished to Aetna as collateral on the supersedeas bond, *i.e.*, the insurance proceeds which Celotex used to purchase the certificates of deposit pledged to First Florida bank as security for the irrevocable letters of credit given to Aetna, as property of the Celotex bankruptcy estate under 11 U.S.C. § 541(a)(1).

By stay entered October 17, 1990 pursuant to 11 U.S.C. §§ 105, 362, the bankruptcy court specifically enjoined all entities from enforcing any judgment against property of the Celotex bankruptcy estate (J.A. at 66.) A bankruptcy "court's power to preserve its jurisdiction by enjoining proceedings that would remove property from the bankrupt estate is fundamental to the scheme of the Bankruptcy Act." *In Re Chanticleer Assoc.*, 592 F.2d 70, 74 (2d Cir. 1979).

In resolving this appeal, we have no need to reach the issue of whether 11 U.S.C. § 362(a)(1) stays actions against third parties which are related to property of the

bankruptcy estate, as was discussed, for example, in *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1035-36 (3d Cir. 1991).[9] Here, the district court erred by ordering Celotex, not the surety Aetna, to release to the Willis plaintiffs the collateral given to Aetna as security for Aetna's obligation on the supersedeas bond – an asset properly viewed as within the Celotex bankruptcy estate. *See In Re Celotex Corp.*, 128 B.R. 478, 481 (Bankr. M.D. Fla. 1991).

The district court order granting the Willis plaintiffs' motion for Celotex's release of the supersedeas bond proceeds pursuant to Fed. R. Civ. P. 65.1 is accordingly vacated, and remanded to the district court with instructions to refer the matter to the United States Bankruptcy Court for the Middle District of Florida for disposition.

VACATED AND REMANDED

WILKINS, Circuit Judge, concurring:

I agree that the district court erred in permitting execution by the Willis plaintiffs and join the majority in reversing the district court. I write separately, however, because I believe that the majority has adopted a mistaken view of the facts, one that is not urged by the parties or supported by the record, in finding that the district court ordered Celotex to release its assets securing payment on the irrevocable letter of credit. This error results in the majority deciding the case on the basis that

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[9] Specifically, we find no occasion to consider whether the Willis plaintiffs may proceed against the surety on the supersedeas bond in the district court, as that issue is not presently before us. *C.F. Borman*, 946 F.2d at 1036 (discussing whether section 362(a)(1) stays third-party payment on a supersedeas bond).

the proceedings in the district court were stayed by the automatic stay provisions of 11 U.S.C.A. § 362(a) (West 1979 & Supp. 1992). While the proceedings were properly stayed, authority for the stay is found in 11 U.S.C.A. § 105(a) (West Supp. 1992), not the automatic stay provisions of § 362(a).

While the majority is unquestionably correct that § 362(a) would stay proceedings by the Willis plaintiffs against Celotex or would stay proceedings to obtain assets belonging to Celotex that were held to secure the letter of credit, this is not what occurred factually. The district court actually directed Aetna to discharge its obligation as surety for the supersedeas bond. Consequently, the issue that we should address, and the one presented on appeal, is whether execution against the surety of the supersedeas bond was properly stayed by the order of the bankruptcy court pursuant to 11 U.S.C.A. § 105(a). I would hold that the district court erred in permitting the Willis plaintiffs to execute on the supersedeas bond because, under the unique circumstances pre sented, [sic] the bankruptcy court properly stayed proceedings to collect on supersedeas bonds securing numerous judgments against Celotex under authority found in § 105(a).

I.

The majority interprets the Willis plaintiffs' motion for release of the proceeds of the supersedeas bond as either a proceeding against Celotex itself or a request that Celotex's assets be used to satisfy the judgment secured by the supersedeas bond. Neither the pleadings, the

order of the district court, the parties' briefs on appeal, nor the parties' arguments before this court suggest that the Willis plaintiffs sought, or that the district court ordered, anything other than execution against Aetna under the supersedeas bond. The parties repeatedly asserted during oral argument that the district court required Aetna to satisfy the judgment. The parties' briefs argue that the Willis plaintiffs sought to execute against Aetna and that the order of the district court permitted the Willis plaintiffs to do so. Both the parties and the district court understood the motion, and the district court order, to be directed toward Aetna as surety for the supersedeas bond.

A.

The mistaken view of the facts embraced by the majority perhaps stems from certain misleading representations made by counsel for Celotex. Arguing that § 362(a) stayed the Willis plaintiffs' proceeding against Aetna under an identity of interest theory, counsel for Celotex incorrectly stated in brief and during oral argument that Aetna held $600,000 of Celotex's funds as collateral to secure the supersedeas bond and that if this court permitted the order of the district court to stand, Aetna would pay the judgment, but would in effect do so with Celotex's funds. Coupled with the fact that Aetna did not appeal from the decision of the lower court, these circumstances apparently led the majority to mistakenly conclude that the district court order was directed at Celotex or its assets.

A review of the material submitted to the panel following oral argument indicates that Celotex grossly oversimplified the financial transaction into which the parties entered and its legal ramifications. To obtain Aetna's participation as surety, Celotex purchased certificates of deposit that it pledged to First Florida Bank, N.A. The bank then issued an irrevocable letter of credit in favor of Aetna upon which Aetna could draw in the event it paid the judgment. Aetna, in turn, agreed to act as surety on the supersedeas bond.[1] Thus Aetna clearly holds a fully protected position since if it were to satisfy the judgment, it would immediately draw on the irrevocable letter of credit. Equally clear, and contrary to the representations of Celotex, is that Aetna does not hold assets belonging to Celotex.

That Aetna is fully secured explains its failure to appeal but does not sustain the conclusion of the majority that the Willis plaintiffs sought Celotex's assets. Rather,

> [i]t is well established that a letter of credit and the proceeds therefrom are not property of the debtor's estate under 11 U.S.C. § 541. When the issuer [bank] honors a proper draft under a letter of credit, it does so from its own assets and not from the assets of its customer [Celotex] who caused the letter of credit to be issued. As a result, a bankruptcy trustee is not entitled to enjoin a post petition payment of funds under a letter of credit from the issuer to the beneficiary

---

[1] This financial arrangement appears to be relatively common. *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 800-03 (7th Cir. 1986) (Easterbrook, J., concurring).

> [Aetna], because such a payment is not a transfer of debtor's property. . . .

Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.), 831 F.2d 586, 589 (1987) (citations omitted), reh'g on other grounds, 835 F.2d 584 (5th Cir. 1988); *see also Southmark Corp. v. Riddle (In re Southmark Corp.)* Nos. 389-36324-SAF-11, 391-3454, 1992 WL 36295 (Bankr. N.D. Tex. Feb. 11, 1992); *In re M.J. Sales & Distrib. Co.*, 25 B.R. 608, 614 (Bankr. S.D.N.Y. 1982).

If Aetna were to satisfy the Willis plaintiffs' judgments, it could not do so with Celotex's assets because it does not hold Celotex's assets. Instead, it would compensate the Willis plaintiffs with its own funds, then immediately draw on the irrevocable letter of credit. Section 362 would not stay Aetna from proceeding against the letter of credit because the letter of credit issued by the bank and its proceeds are not part of Celotex's bankruptcy estate and because the obligation of the bank under the irrevocable letter of credit is completely independent of any obligations between Aetna and Celotex. *See In re Southmark Corp.*, 1992 W.L. 36295, at * 9.

On the other hand, "[c]ollateral which has been pledged by a debtor as security for a letter of credit is property of the debtor's estate." *In re Compton Corp.*, 831 F.2d at 590. Thus, the certificates of deposit pledged by Celotex as security for the irrevocable letter of credit are a part of the bankruptcy estate. Section 362(a) would stay proceedings by the bank to obtain the assets absent relief from the stay by the bankruptcy court. 11 U.S.C.A. § 362(a); *In re M.J. Sales*, 25 B.R. at 615.

B.

Once Aetna's fully secured position is understood, it becomes readily apparent why Aetna did not oppose the district court order requiring that it perform on the supersedeas bond. Similarly, the remainder of the evidence upon which the majority relies to support its conclusion that the proceedings below were against Celotex or Celotex's assets in fact supports the conclusion that the Willis plaintiffs sought to execute against Aetna as surety for the supersedeas bond.

1.

Federal Rule of Civil Procedure 65.1, pursuant to which the Willis plaintiffs moved the district court, is entitled "Security: Proceedings Against Sureties," and permits the surety's liability to be enforced without the necessity of bringing an independent action. Aetna, not Celotex, was the surety on the supersedeas bond. Although the majority cites some authority for the proposition that a party may move under this rule to enforce a judgment against the party that posted the bond, certainly this is not the primary function of the rule. And, in view of Celotex's bankruptcy, which would clearly stay proceedings against Celotex or its assets, neither is it the most reasonable interpretation of this motion under the rule.

The majority also relies on the fact that the caption of the motion named Celotex as the party defendant. Yet, the style of the case is consistent with the provisions of Rule 65.1 which states: "The surety's liability may be

enforced on motion without the necessity of an independent action." The Willis Plaintiffs' "Motion For Release of Supersedeas Bond" expressly states that "*Celotex has failed to pay* the plaintiffs' judgments, and the Court should release the full security *provided by the Supersedeas Bond.*" (Emphases [sic] added.) Indeed, the procedural course taken by the Willis plaintiffs appears to be exactly that envisioned by the rule.

2.

Additionally, the majority places much weight on the fact that the Willis plaintiffs sought "release of the *proceeds* of the Supersedeas Bond posted by the defendant Celotex" and states that the district court ordered Celotex "to pay the judgment by releasing to the Willis plaintiffs the collateral which Celotex had furnished Aetna under the surety agreement," referring to the certificates of deposit it posted with the bank. (Emphasis added.) The references by the lower court and the Willis plaintiffs to "proceeds" of the bond do not support the majority's conclusion that the Willis plaintiffs were proceeding against Celotex or the certificates of deposit. Also this statement is at odds with the undisputed facts surrounding the financial transaction entered into by Celotex, Aetna, and the bank.

Further, the term "proceeds" is not commonly understood to refer to collateral or security. "Proceeds" is defined as "the sum, amount, or value of property sold or converted into money or into other property." *Black's Law Dictionary* 1204 (6th ed. 1990). The Willis plaintiffs asked specifically for that which they sought the proceeds of the bond, rather than the bond itself. The Willis plaintiffs and

the district court must have intended the term "proceeds" to refer to the value that would be available to the Willis plaintiffs after Aetna was ordered to fulfill its promise to pay under the bond.

Moreover, the Willis plaintiffs could not have been asking for release of the certificates of deposit securing the letter of credit. It is undisputed that they were not aware that this security existed until Celotex provided this information to the panel following a request during oral argument. Also, since Aetna does not have either actual or constructive possession of Celotex's assets, it would be impossible for Aetna to satisfy the judgment with Celotex's assets.

3.

Next, the majority states that "the district court determined that a 'supersedeas bond or *other security* posted pre-petition by the debtor' was not part of the Celotex bankruptcy estate over which the bankruptcy court possessed exclusive jurisdiction" and implies that in referencing "other security" the district court was actually ordering execution on Celotex's property. A review of the full quotation, however, demonstrates that the district court was not referring to security posted by Celotex. The district court order states in pertinent part:

> The Court has found no Fourth Circuit cases addressing whether a supersedeas bond or other security posted prepetition by the debtor remains part of the debtor's estate after filing the petition in bankruptcy. However, we are persuaded by analogous cases from at least four

> other circuit courts which have held that security filed with the clerk of the court pending resolution of an appeal ceases to be part of the bankrupt's estate. *See Mid-Jersey Nat'l Bank*, 518 F.2d at 643. . . .

(Other citations omitted.)

The "other security posted pre-petition" language used by the district court cannot be read as a reference to the certificates of deposit. The district court instead was referring to *Mid-Jersey* and other cases in which the party seeking to stay execution of the judgment on appeal had actually deposited with the clerk of court money or property sufficient to pay the judgment.

C.

The parties to the litigation and the district court were aware that Celotex had filed for bankruptcy. To construe the proceedings below as being directed toward Celotex or its assets, we would have to believe that the Willis plaintiffs' sought – and the district court ordered – relief that was obviously barred by § 362(a) instead of relief that is provided primarily to protect litigants in the position of the Willis plaintiffs. Neither party has suggested this interpretation of the proceedings below, and, to the contrary, the litigants clearly viewed the action as one to execute on the supersedeas bond for which Aetna was the surety. The Willis plaintiffs' motion was only what it purported to be – one seeking to execute against Aetna as surety on the supersedeas bond.

II.

Because the Willis plaintiffs sought and the district court ordered Aetna, as surety on the supersedeas bond, to satisfy the Willis plaintiffs' judgment, the court must determine whether the Willis plaintiffs' action against Aetna to collect on the supersedeas bond was properly stayed.[2] The October 17, 1990 order of the bankruptcy court, as construed by the court in its order of June 13,

---

[2] Celotex contends that 11 U.S.C.A. § 362(a)(1), (3) stayed the Willis plaintiffs' proceedings against Aetna because the supersedeas bond was an asset of the bankruptcy estate and because Aetna has an "identity of interest" with Celotex such that a proceeding against Aetna is in effect a proceeding against Celotex. *See A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 999-1002 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). These arguments lack merit.

This court has not previously addressed whether a supersedeas bond is an asset of the bankruptcy estate. Other courts have differing opinions on this issue. *Compare Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643 (3d Cir. 1975), *with Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1032-35 (3d Cir. 1991). While there is considerable question whether a supersedeas bond is a part of the bankruptcy estate, *see In re Southmark Corp.*, 1992 W.L. 36295, at * 9, we need not resolve this issue because even assuming a supersedeas bond is an asset of the bankruptcy estate during the pendency of the appeal, here the appeal had been decided unfavorably to Celotex and the mandate had issued prior to Celotex's bankruptcy filing, thus extinguishing any interest Celotex may have had in the bond.

Moreover, Aetna owed a duty to the Willis plaintiffs under the supersedeas bond separate from and independent of Celotex's duty to pay the judgments. Thus, under the teachings of *Washburn & Kemp, PC v. Committee of Dalkon Shield Claimants (In re A.H. Robins Co.)*, 846 F.2d 267 (4th Cir. 1988), Aetna is not so identified with Celotex that suit against it is stayed under an "identity of interest" theory by § 362(a)(1).

1991, makes clear that the bankruptcy court, pursuant to its authority under 11 U.S.C.A. § 105(a), stayed proceedings to execute against the supersedeas bonds posted by Aetna on behalf of Celotex. *In re Celotex Corp.*, 128 B.R. 478 (Bankr. M.D. Fla. 1991). This court has found that a bankruptcy court may properly exercise its authority under § 105 to enjoin an action against a third party when the court finds " 'that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party.' " *Piccinin*, 788 F.2d at 1003 (quoting *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.)*, 25 B.R. 1018, 1020 (D.N.M. 1982)). Additionally, the bankruptcy court may " 'enjoin a variety of proceedings . . . which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan.' " *Id.* (quoting *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 40 B.R. 219, 226 (S.D.N.Y. 1984).

The bankruptcy court did not act improperly when it enjoined execution on the supersedeas bonds posted to secure judgments owed by Celotex. In support of its § 105(a) order, the bankruptcy court detailed the magnitude of the task it faced in attempting to oversee the bankruptcy proceedings which resulted from the shear number of pending personal injury cases in which collateralized supersedeas bonds had been posted. *In re Celotex Corp.*, 128 B.R. at 482-83. It concluded that a race to the courthouse by those insured by supersedeas bonds would impose a burden on the reorganization process and would impair its ability to, for example, evaluate the tort judgments themselves to ascertain whether any portion of a judgment was voidable by the bankruptcy court. *Id.*

at 483-84. Thus, while in the usual bankruptcy situation, reorganization would not be affected by third-party payments on a supersedeas bond securing a judgment owed by the bankrupt, this is not the usual situation. I believe that the peculiar circumstances in which the bankruptcy court found itself justified the exercise of its authority under § 105(a) to enjoin execution against the supersedeas bonds.[3]

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[3] I also note that permitting the bankruptcy court to control execution on the bonds by lifting of the stay prevents the inconsistency of judgments that could result if each court in which a supersedeas bond is posted undertakes a determination of whether execution is appropriate.

FILED: August 7, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-1446
(CA-89-1388-N)

DANIEL A. WILLIS; CAROLYN W. WILLIS; HERMAN L. MENSING, JR.; FRANCES K. MENSING; VINCENT H. LEWIS; RUBY B. LEWIS; ELWOOD F. HAMLET; LOIS D. HAMLET,

Plaintiffs-Appellees,

and

RICHARD L. TAYLOR; MARY S. TAYLOR; WILLIAM F. COBB; LILLIE P. COBB; ROY B. BASS; SUSAN R. BASS,

Plaintiffs,

versus

THE CELOTEX CORPORATION,

Defendant-Appellant,

and

OWENS-CORNING FIBERGLASS CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; GAF CORPORATION; KEENE CORPORATION; STANDARD INSULATIONS, INC.; RAYMARK INDUSTRIES, INC.; OWENS-ILLINOIS, INC.; H.K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION; CROWN CORK & SEAL COMPANY, INC.; COMBUSTION ENGINEERING, INC.; PITTSBURGH CORNING CORPORATION,

Defendants.

ORDER

Appellees have filed a petition for rehearing and suggestion for rehearing *en banc*. Appellants have filed a response to the petition.

The Court grants the petition for rehearing and withdraws the published opinion of this Court filed June 18, 1992. Appellees' suggestion for rehearing *en banc* is held in abeyance pending further action by this Court.

Entered at the direction of Judge Wilkins with the concurrence of Judge Russell and Judge Ward, United States District Judge sitting by designation.

For the Court

/s/ Bert M. Montague
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Daniel A. Willis, *et al.*, Plaintiffs,	]	
v.	]	CIVIL ACTION No. 87-645-N
The Celotex Corporation, *et al.*, Defendants.	]	

ORDER

The matter came before the Court on plaintiffs' motion to release the proceeds of a supersedeas bond posted by defendant to stay execution on judgments entered in favor of plaintiffs, pending resolution of defendants' appeal. The matter was initially set for hearing on December 27, 1990, but counsel for defendant asserted in a telephone conference call with the Court that he did not plan to appear for the hearing[1]. The Court heard argument on the merits of the motion for release of the proceeds of the supersedeas bond during the conference call

[1] On December 26, 1990, the Court participated in a telephone conference call with plaintiffs' counsel, Messrs. Rosenthal and Smith-George, and defendant Celotex Corporation's bankruptcy counsel, Mr. Warren.

Mr. Warren informed the Court that he did not plan to attend the hearing because it was his opinion that the bankruptcy court in Tampa, Florida had jurisdiction over the proceeds of the bond by virtue of defendant's Chapter XI filing of a petition in bankruptcy in that court on October 12, 1990. Mr. Warren also took exception to this Court's exercise of jurisdiction over the supersedeas bond.

in lieu of having defense counsel, a resident of Tampa, Florida, travel to Norfolk, Virginia for the hearing.

For the reasons set forth below, the Court finds that it has jurisdiction over the supersedeas bond and hereby GRANTS plaintiffs' motion for release of the proceeds of the supersedeas bond.

Factual Background:

In December 1988, after a four-week long trial in this Court, the jury rendered a verdict against defendant The Celotex Corporation (Celotex) and other asbestos manufacturers. On February 1, 1989, the Court, having reduced the judgments by the amount of settlements paid by co-defendants to verdict, entered four Amended Orders of Judgment in plaintiffs' favor totalling $526,500. *See* Plaintiffs' Motion for Release of Supersedeas Bond, Exhibits A-G.

On March 13, 1989, in accordance with Fed. R. Civ. P. 62(d), Celotex filed a supersedeas bond of $600,000, executed by Aetna Casualty and Surety Company, to stay execution of the judgments pending their appeal.

The Fourth Circuit Court of Appeals affirmed this Court's Amended Orders of Judgment on June 15, 1990, *see Willis v. Raymark Industries, Inc.*, No. 89-1704, and denied Celotex's Petition for Rehearing on September 26, 1990.

Plaintiffs' judgments became final and enforceable on October 3, 1990, pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, which provides that the

mandate shall issue " . . . 7 days after entry of the order denying the petition [for rehearing] unless the time is shortened or enlarged by order." Celotex filed no motion for a stay of the mandate, therefore, the mandate issued October 3, 1990, *i.e.*, 7 days after the September 26 denial of defendants' petition. Celotex filed its petition in bankruptcy in Tampa, Florida on October 12, 1990.

Following the denial of defendant Celotex's petition for rehearing, plaintiffs' counsel notified defense counsel that it intended to move for release of the bond proceeds.[2]

On October 26, 1990, plaintiffs filed a motion pursuant to Fed. R. Civ. P. 65.1[3] with the Clerk of this Court for release of the proceeds of the supersedeas bond

---

[2] Plaintiffs' counsel avers, and there has been no denial, that local defense counsel asked plaintiffs' counsel to take no precipitous action because he intended to send plaintiffs' counsel a check in full satisfaction of the judgment plus interest, on October 12, 1990.

On October 12, 1990, while the proverbial check was to be in the mail, Celotex filed a Chapter XI petition for reorganization in the bankruptcy court, Tampa, Florida.

[3] Fed. R. Civ. P. 65.1 provides in pertinent part that:

> Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action . . .

toward satisfaction of the judgments against defendant Celotex.

Celotex has claimed, *inter alia*, that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, precludes the motion for release of the proceeds of the bond in this Court, and that plaintiffs' proper course is to seek a modification of the bankruptcy court's automatic stay. Celotex has also argued that judicial economy would be better served if this Court stayed its hand on the bond release and allowed the bankruptcy court to distribute the estate of Celotex. Celotex points to the procedural posture of its asbestos litigation (*i.e.*, approximately 100 appeals pending with over $70 million in bonds posted as surety), and implies that this Court's exercise of jurisdiction over the bond could lead to Celotex's being haled into district courts throughout the country.

We disagree both with Celotex's legal argument regarding the automatic stay provision's applicability to this motion to release the proceeds of the bond, and its depiction of what could happen to Celotex in the event we exercise jurisdiction over the bond.

I. The Automatic Stay Provision, 11 U.S.C. § 362

The first issue before the Court is whether the automatic stay provision of the 1978 Bankruptcy Code, 11 U.S.C. § 362(a), precludes plaintiffs' motion to release the proceeds of tne supersedeas bond for satisfaction of the judgments entered against Celotex.

Section 362(a)(2) and (3) provides in pertinent part that:

> . . . a petition filed under section 301, 302, or 303 of this title [11 U.S.C. §§ 301, 302, 303] . . . operates as a stay, applicable to all entities, of –
>
> > (2)the enforcement, *against the debtor or against property of the estate*, of a judgment obtained before the commencement of the case under this title . . .
> >
> > (3)any act to obtain possession of *property of the estate or of property from the estate or to exercise control over property of the estate;*

(emphasis added).

The question we must resolve is whether the supersedeas bond filed in this Court is the property of Celotex over which the Chapter XI court in Tampa, Florida has exclusive jurisdiction, thereby staying the motion before this Court.

We deem the supersedeas bond as separate from Celotex's estate, and, accordingly, exercise jurisdiction over the bond. *See Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975).

The Court has found no Fourth Circuit cases addressing whether a supersedeas bond or other security posted pre-petition by the debtor remains part of the debtor's estate after filing the petition in bankruptcy. However, we are persuaded by analogous cases from at least four other circuit courts which have held that security filed with the clerk of the court pending resolution of an appeal ceases to be part of the bankrupt's estate. *See Mid-Jersey Nat'l Bank*, 518 F.2d at 643; *Saper v. West*, 263 F.2d 422 (2d Cir. 1959) *cert. denied*, 360 U.S. 916 (1959); *Atlantic Richfield Co.*

v. Good Hope Refineries, 604 F.2d 865 (5th Cir. 1979); *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987).

The Third Circuit Court, in a case very similar to our own, compared security filed with the clerk of the court to the res of trust, with the court acting as trustee of the res in determining the beneficiaries pursuant to the appeal. *Mid-Jersey Nat'l Bank*, 518 F.2d at 643. In so doing, the court noted that the debtor parted with its ownership of the security when it entrusted the certificate of deposit with the court. *Id.*

It is undisputed that defendant Celotex filed a supersedeas bond with the clerk of this Court on March 13, 1989, for purposes of insuring plaintiffs' judgments pending resolution of the appeal. We view this date as the operative time when Defendant Celotex relinquished control over the proceeds of the bond to the Court. *See Mid-Jersey Nat'l Bank*, 518 F.2d at 644.

The *Mid-Jersey Nat'l Bank* court adopted the rationale of the Second Circuit Court, which had held earlier that a judgment debtor has only a "contingent" interest in security entrusted to the trial court because such interest turns on the "highly remote possibility that the trial court's judgment [will] be reversed on appeal." *See Grubb*, 833 F.2d at 224-225, *quoting Saper v. West*, 263 F.2d at 422.

However, defendant Celotex contends that the supersedeas bond is still part and parcel of its estate and is, therefore, subject to the automatic stay provision of 11 U.S.C. § 362. In support of this proposition, defendant relies solely on a case from the Seventh Circuit Court of Appeals: *Sheldon v. Munford, Inc.*, 902 F.2d 7 (1990).

We deem *Sheldon* wholly inapposite because of its different procedural posture from the case at bar. In *Sheldon*, the appeal had clearly not been resolved because Judge Posner decided that the automatic stay provision precluded *the appeal*. *Id.* at 8-9 (emphasis added). In our case, however, defendants' appeal and petition for rehearing have been denied by the Fourth Circuit; a mandate issued on October 3, 1990, which rendered the judgments against Celotex final and enforceable. *See* Fed. R. App. P. 41(a). The creditors in *Sheldon* had no such final and enforceable judgment when they petitioned the Seventh Circuit to lift the automatic stay. Thus, we agree with plaintiffs' contention that *Sheldon* stands for the limited proposition that an appeal cannot proceed in the face of an automatic stay because such an appeal may affect the creditors.

In any event, we find the analysis in *Saper, Mid-Jersey Nat'l Bank*, and their progeny more consistent with the underlying purpose of supersedeas bonds: to protect the party prevailing at the trial level from the possible future insolvency of the losing party. *See Mid-Jersey Nat'l Bank*, 518 F.2d at 644. We view this purpose as undermined if we allow plaintiffs' two years of forbearance in enforcing the judgments against Celotex to be thwarted by Celotex's Chapter XI filing and concomitant claim that the motion to release the bond is automatically stayed.

II. The Posture of Celotex's Asbestos Litigation

We find unpersuasive defendants' claim that this Court should decline deciding this motion because of the approximately 100 asbestos cases on appeal, which are

allegedly secured by over $70 million in supersedeas bonds and other forms of security. Defendant cites no authority, and the Court has found none, for the proposition that plaintiffs in this case, who have procured a final judgment and issuance of mandate, should be prohibited from enforcing this judgment in light of other asbestos cases involving defendant Celotex which have not completely run through the appellate gauntlet.

In the absence of any authority suggesting that this Court deny plaintiffs' right to proceed toward enforcement of its final judgments, we decline to do so.

Accordingly, we deem this Court's jurisdiction over the bond as proper and GRANT release of the proceeds of the supersedeas bond.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia

January 2, 1991

Supreme Court, U.S.
FILED
MAR 18 1993
OFFICE OF THE CLERK

No. 92-1358

In The

Supreme Court of the United States

October Term, 1992

DANIEL WILLIS, CAROLYN WILLIS, HERMAN MENSING, FRANCES MENSING, VINCENT LEWIS, RUBY LEWIS, ELWOOD HAMLET, AND LOIS HAMLET,

Petitioners,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the Court, in its certiorari discretion, review *Willis v. The Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992) (Pet. App. at 1-9) which reversed the district court's (Eastern District of Virginia, Norfolk Division) January 2, 1991 *Order Releasing Supersedeas Bond to Plaintiffs* (Pet. App. at 36-43)?

Stated otherwise, *at the present time,* are there special and important reasons for the Court's exercising its certiorari jurisdiction, the Fourth Circuit not having demonstrated an apparent departure from the accepted and usual course of judicial proceedings in vacating the district court's January 1991 order, which order conflicts with the bankruptcy court's extant injunction against petitioners' executing upon the supersedeas bond?

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No. 92-1358

In The

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DANIEL WILLIS, CAROLYN WILLIS, HERMAN MENSING, FRANCES MENSING, VINCENT LEWIS, RUBY LEWIS, ELWOOD HAMLET, AND LOIS HAMLET,

Petitioners,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

Respondent, The Celotex Corporation, opposes the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in the above-entitled case.

OPINIONS AND JUDGMENTS BELOW

The United States Bankruptcy Court for the Middle District of Florida entered its October 17, 1990 order

precluding judgment creditors from proceeding in various state and federal courts against supersedeas bonds that The Celotex Corporation, a debtor in possession, had posted, without the approval of the bankruptcy court. Pet. App. 5, quoting *In re Celotex Corp.*, 128 B.R. 478, 482 (Bankr. M.D. Fla. 1991); *see* Celotex App. 1-4.

On January 2, 1991, the United States District Court for the Eastern District of Virginia entered its ORDER, reciting that it deemed that its own jurisdiction over a supersedeas bond posted by Celotex was "proper," therefore "GRANT[ING] release of the proceeds of the supersedeas bond." Pet. App. at 43.

The Fourth Circuit vacated the district court's January 1991 order, concluding that the Willis plaintiffs' "immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization. . . . Consequently, the bankruptcy court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under [Bankruptcy Code § 105(a), 11 U.S.C.A.] § 105(a). . . . " Pet. App. at 9. The court stated in its vacating decision that the district court would be authorized to conduct "further proceedings at such time as the bankruptcy court lifts the § 105(a) stay." *Id.*

STATEMENT OF THE CASE

While not suggesting that petitioners have misstated the case (Petition at 4-8), it is apparent that they have overstated the facts, particularly with regard to the underlying personal injury claims, the posting of the

bond, and decisions by the bankruptcy and district courts. SUP.CT.R. 14.1(g) requiring a *concise* statement of the case containing the facts material to the consideration of the questions presented, the case is that two separate and independently created courts, the district court and the bankruptcy court[1], have entered conflicting orders. On October 17, 1990, the bankruptcy court entered a temporary injunction, *inter alia*, prohibiting personal injury claimants, including petitioners, from levying execution upon supersedeas bonds, posted by Celotex. Celotex App. 1-4. However, on January 2, 1991, the district court filed its order, *ante at 2*, the effect of which did not enhance petitioners' ability to collect the judgment, because the bankruptcy court's injunction was extant – the district court could not nullify that order.

The proceedings in the Eastern District of Virginia were premature as of January 2, 1991, the date of the district court's order; and, petitioners' filing here is equally premature. Indeed, the Fourth Circuit tacitly emphasized the lack of ripeness in that circuit: (a) the bankruptcy court might very well lift its stay[2]; and (b) the court concluded, "we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay."[3]

In other words, the Fourth Circuit resolved and disposed of any perceived problem that the district court might have created by filing an order at odds with the

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[1] U.S. CONST. art. I § 8; art. III §§ 1, 2.

[2] *Willis v. Celotex Corp.*, n.5 *supra at i* (Pet. App. at 8).

[3] *Willis, supra*, n.1 (Pet. App. at 9).

bankruptcy court's 11 U.S.C.A. § 105(a) (West 1993) stay order; or *vice verse,* any problem that the bankruptcy court might have created by entering the stay. Whether the bankruptcy court was correct, or whether the district court was correct is beside the point, at least for now, because petitioner has not yet asked the bankruptcy court to modify its § 105(a) stay order. Were the Willis petitioners to be unsuccessful in the bankruptcy court, their recourse is to the United States District Court for the Middle District of Florida and, if unsuccessful there, to the Eleventh Circuit. 28 U.S.C.A. § 158 (West 1968 & Supp.).

SUMMARY OF ARGUMENT

Petitioners have not presented for review a question that implicates SUP.CT.R. 10's "special and important reasons." The United States Court of Appeals for the Fourth Circuit has not rendered a decision that "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." *Id.*

If petitioners are correct in their expressed concern as to a bankruptcy court's enjoining execution upon a supersedeas bond, given by the judgment debtor to stay execution upon a judgment, their Petition For Writ Of Certiorari is premature because they have not sought a modification of the injunction.

ARGUMENT

I

The Court's certiorari review being limited in the present context to the question whether the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings that there are special and important reasons for review, petitioners make no showing. Rather, they have submitted a redundant review of the principles of supersedeas bonds and stays of execution, and a rather petulant paraphrasing of the Fourth Circuit's holding, complaining that the circuit court has held that an otherwise valid and operable supersedeas bond loses its vitality, at least temporarily, "[i]f the judgment debtor becomes insolvent and files for protection under the Bankruptcy Code. . . . " Pet. at 8-12. It is not at all apparent that the instant bond has lost its "vitality" and, moreover, assuming *arguendo* that a bond is temporarily ineffective, it does not appear that the Fourth Circuit's decision constitutes a "depart[ure] from the accepted and usual course of judicial proceedings." SUP.CT.R. 10.1. Petitioners do not cite one authority for the proposition that the decision "departs."

Nor, is the petitioners' projected horror story, Pet. at 8-12, at all convincing. As a matter of fact, it is likely that one might conclude that it is as frivolous as Mr. Heller's description of how bored servicemen while away their time. *Id. at 9 n. 2.* Neither the bankruptcy court nor the Fourth Circuit has held that the supersedeas bond has lost its "vitality" or that petitioners will not collect their judgments. There is no evidence that the cost of bonds will be "inflated," *id. at 11*, or that the Fourth Circuit's

decision "will inevitably generate confusion in the courts concerning the scope of protection that must be afforded by a supersedeas bond in order [to] entitle a judgment-loser to a stay under [FED.R.CIV.P.] 62(d)," *id. at 11-12*. Supersedeas bonds are available as a matter of right to stay executions upon money judgments, the practice being that the trial court's approval of the bond is a mere formality, being limited to the question whether the particular insurer or the form of the bond is approved or appropriate.[4]

Moreover, the subject supersedeas bond *enhances* rather than depreciates petitioners' chances of collecting their judgments. It is indeed difficult to understand petitioners' logic in arguing that the specter of bankruptcy court injunctions prohibiting executions upon civil judgment supersedeas bonds would force debtors "to pay trial court judgments immediately, possibly driving them further toward insolvency." *Id. at 11*, citing *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 227 n. 3 (10th Cir. 1987). As the Fourth Circuit noted, Celotex faced 141,000 "asbestos-related personal injury actions" at the time when it filed for reorganization under Chapter 11 of the Bankruptcy Code on October 12, 1990. Pet. App. at 8, citing *In re Celotex Corp.*, 128 B.R. 478, 482-83 (Bankr. M.D. Fla. 1991). In the real world of massive tort litigation, manufacturers and distributors seek bankruptcy court protection for themselves and their creditors; they seek resolutions of very complex problems. Such cases do not

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[4] FED.R.CIV.P. 62(d): "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay. . . . The stay is effective when the supersedeas bond is approved by the court."

involve the isolated tort. Whether Celotex filed for protection when it did or earlier, when petitioners obtained their judgments, is beside the point because the existing tort system forced Celotex, a former manufacturer of asbestos-containing products, to seek protection under the Bankruptcy Code. Once that protection is sought the interests of *all* creditors mandate the maintenance of the status quo pending an evaluation of the fair and equitable treatment of many thousands of claimants.

Finally, petitioners' assertion that the Fourth Circuit's "opinion . . . will inevitably generate confusion in the courts concerning the scope of protection that must be afforded by a supersedeas bond . . . ", Pet. at 11-12, is rather extravagant, to say the least. There is no confusion in federal trial courts, because they are usually governed by state supersedeas rules which are clear cut in cases of money judgments. FED.R.CIV.P. 62(f).[5] Generally, in state court cases supersedeas is a matter of right to suspend execution upon civil judgments.[6] Thus there is no need

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[5] Rule 62(f): "**Stay According to State Law.** In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state."

[6] *See, e.g.*, FLA.R.APP.P. 9.310, 32 FLA.STAT.ANN. (West 1992 & Supp.): "**(STAY PENDING REVIEW)**: (1)*Money Judgments.* When the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review without the necessity of motion or order, on posting of a good and sufficient bond equal to the principal amount of the

for the Court's "act[ing] promptly to prevent unnecessary chaos in the federal and state courts. . . . " *Id. at 12.* There is, and will be, no chaos and confusion.

II

The threshold observation, as to petitioners' exaggerated and unsubstantiated statement that the Fourth Circuit held that bankruptcy courts have virtually limitless power, Pet. at 12, *subheading*, is that they have made their application to the wrong court. As the Fourth Circuit stated, the essential area of operations should be the bankruptcy court where petitioners have the absolute and unfettered right to make their application to lift the § 105(a) stay. If they are not satisfied with the court's ruling there, they are entitled to appeal it. Candidly, one must wonder why petitioners have labored so mightily in the Fourth Circuit which does not have jurisdiction over

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judgment plus twice the statutory rate of interest on judgments. . . . " Celotex maintains its principal place of business in Florida.

In Virginia, where the subject judgments were rendered and filed, the rule is substantively identical. VA.CODE.ANN. § 8.01-676.1 (Michie 1992): "**Security for appeal.** – C. *Security for suspension of execution.* – An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and except as provided in subsection D, execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount which may be added by the courts."

the United States Bankruptcy Court for the Middle District of Florida.

Petitioners are disingenuous in their statements that the Court's assistance is required to correct the state of affairs as such pertain to the protection of judgment creditors, and to trial courts' approval of supersedeas bonds. Petitioners themselves have not brought this case here through the proper channel, the Eleventh Circuit. The bankruptcy courts and the United States District Courts are courts of limited jurisdiction, each having certain powers granted by Congress. Taking as a given the picture painted by petitioners – these separately and independently constituted courts have entered conflicting orders – the Fourth Circuit no more has authority to reverse the bankruptcy court's order than the Eleventh Circuit has authority to reverse the district court's order. In other words, petitioners have leapfrogged the Eleventh Circuit and the courts within its jurisdiction.

The adjective nature of the problem being understood, not much remains to be written about petitioners' arguments, supposedly premised upon Fed.R.Civ.P. 65.1, and § 524(e) of the Bankruptcy Code, 11 U.S.C.A. § 524(e) (West 1993). Rule 65.1 is the surety's consent to the district court's jurisdiction for enforcing (executing upon) the supersedeas bond, without necessity of filing a separate suit or action. Section 524(e) constitutes nothing more than the common sense proposition that discharge of a debtor in bankruptcy does not affect the liability of any other entity or the property of such entity. Petitioners' statement that the bankruptcy court's injunction "directly conflicts with [Rule 65.1 and § 524(e)]", Pet. at 13, is patently without merit. Of course Aetna Casualty &

Surety Company submitted to the district court's jurisdiction, but such is irrelevant in light of the bankruptcy court's jurisdiction to enjoin petitioners' executing upon the bond. It is not necessary to further burden the Court as to § 524(e), there having been no discharge as of this time.

If petitioners are correct in their various arguments, *e.g.*, that the Fourth Circuit "cannot [ ] explain" how precluding execution upon the supersedeas bond facilitates the bankruptcy court's controlling all litigation involving Celotex, Pet. at 16, it is readily apparent that they have simply wasted time and resources in the Fourth Circuit. Without criticizing that circuit, we are left wondering how *any* order by that court would affect a bankruptcy court's decision in Florida. The best advice for petitioners is that tacitly enunciated by the Fourth Circuit: petitioners are entitled to file their application in the bankruptcy court seeking a modification or lifting of the § 105(a) stay and, if unsuccessful there, they may seek a reversal in the Middle District of Florida or in the Eleventh Circuit. If the Eleventh Circuit courts rule incorrectly, petitioners are entitled to seek the Court's discretionary certiorari review of an important matter that manifests a departure from the accepted and usual course of judicial proceedings. SUP.CT.R. 10.1(a).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF § 362 STAY TO PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF § 362 TO PENDING MATTERS ..... App. 1

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:	Chapter 11
THE CELOTEX CORPORATION, et al.,	Consolidated Case Nos.: 90-10016-8B1 and 90-10017-8B1
Debtors. /	

ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF §362 STAY TO PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF §362 STAY TO PENDING MATTERS

THIS CAUSE came before the Court upon the Debtors' Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters (the "Motion"). There being no objection hereto by the United States Trustee, and the Court having considered the Motion, the arguments of counsel regarding the merits of the Motion, the record in the case and being otherwise duly advised in the premises, finds that this Court pursuant to 28 USC §1471(e), has exclusive jurisdiction of all of the property of The Celotex Corporation and Carey Canada Inc., wherever located, and that this Court, pursuant to §§105 and 362 of the Bankruptcy Code, may issue any order, process or judgment as may be necessary or appropriate to carry out the provisions of the Bankruptcy Code and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Debtors' Motion be, and the same is, hereby granted.

2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting for or on their behalf and all other entities (collectively, "Entities") be and each of them are hereby stayed, restrained and enjoined from:

a. Commencing or continuing, including issuing or employing process, any judicial, administrative or other proceeding against any of the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 cases, or recovering a claim against any of the Debtors that arose before the commencement of the Debtors' Chapter 11 cases;

b. Enforcing, against any of the Debtors or against property of any of the Debtors, a judgment obtained before the commencement of the Chapter 11 cases;

c. Taking any act to obtain possession of property of any of the Debtors or of property from any of the Debtors;

d. Taking any act to create, perfect or enforce any lien against property of any of the Debtors;

e. Taking any act to create, perfect or enforce against property of any of the Debtors, any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;

f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; and

g. Offsetting any debt owing to any of the Debtors which arose before the commencement of the Chapter 11 cases against any claim against any of the Debtors.

3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition

5. The automatic stay under §362 of the Bankruptcy Code and as extended by this Order operates to stay the continuation of pending matters only as against The Celotex Corporation and Carey Canada Inc. and does not operate to stay the continuation of such matters as against any other named defendant therein unless proceedings under the Bankruptcy Code have been commenced by or against such other named defendant.

DONE AND ORDERED at Tampa, Florida, on October 17, 1990.

/s/ Thomas E. Baynes
Thomas E. Baynes, Jr.
United States Bankruptcy
Judge

cc: Jeffrey W. Warren, Esq.
Lynne L. England, Esq.
Debtors

Supreme Court, U.S.
FILED
MAR 25 1993
OFFICE OF THE CLERK

No. 92-1358

In The

Supreme Court of the United States

October Term, 1992

DANIEL WILLIS, CAROLYN WILLIS, HERMAN MENSING, FRANCES MENSING, VINCENT LEWIS, RUBY LEWIS, ELWOOD HAMLET, AND LOIS HAMLET,

Petitioners,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

Two related themes permeate the Brief in Opposition of Respondent The Celotex Corporation ("Celotex"). First, Celotex suggests that the Court should deny review because the Fourth Circuit's decision is unexceptional and in any event does not permanently harm petitioners. Celotex sees nothing odd in the Fourth Circuit's holding that enforcement of a supersedeas bond may be enjoined due to the occurrence of the very event against which it is designed to protect. Moreover, Celotex adds, the Fourth Circuit did not hold that petitioners' bond may never be enforced; it merely held that petitioners must obtain

leave from the bankruptcy court in Florida before seeking enforcement of the bond in the appropriate trial court in Virginia. The two types of harm to petitioners – the additional expense of litigating their claim to the supersedeas bond in bankruptcy court in Florida, and the reality of indefinite delay in obtaining satisfaction of their claim to the bond – are unworthy of this Court's attention, Celotex implies.[1]

Celotex's first argument thus ignores petitioners' contention that the very purpose of a supersedeas bond is to assure that a judgment creditor will not have to become embroiled in bankruptcy proceedings, however "certain" the ultimate result in bankruptcy court may be. As petitioners have emphasized, Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure contemplate that a judgment creditor whose judgment has been stayed pending appeal should be in exactly the same position that the creditor would have been had the judgment been paid when it was entered. To subject judgment creditors who have prevailed on appeal to the vagaries of bankruptcy proceedings would undermine the intent of these rules. The harm to petitioners resulting from the Fourth Circuit's ruling may be belittled by Celotex, but it should not be ignored by this Court. The underlying judgment in this case awards petitioners compensatory damages for severe personal injuries resulting from Celotex's tortious conduct. The judgment in this case was entered some four years ago. In the two and a half years that Celotex's

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[1] After all, Celotex notes, this case involves only an "isolated tort," not the "very complex problems" confronted by the bankruptcy court in the Celotex bankruptcy. Br.Opp. at 7, 6.

bankruptcy has been pending, the bankruptcy court has not allowed a single judgment creditor to collect on a supersedeas bond, though more than 100 such bonds were posted at the time of the bankruptcy. Pet.App. at 8. It would be naive to conclude that the bankruptcy court seeks to exercise jurisdiction over claims such as petitioners' for any reason other than to extort them, through delay, to relinquish part of their claims to achieve a "consensual" reorganization. The Federal Rules, and the Bankruptcy Code, must be interpreted to avoid such a cruel result.

Celotex professes inability to understand how the refusal to honor the supersedeas bond in this case could ultimately lead courts to require additional, and perhaps onerous, security to be posted by judgment debtors in order to obtain stays of execution. Br.Opp. at 6. This prospect did not confuse the Tenth Circuit in *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 227 n.3 (10th Cir. 1987); it was the *Grubb* court, not petitioners, that first noted that trial courts would be reluctant to approve a supersedeas bond without assurance that the bond would provide the judgment creditor full protection in the event of the debtor's subsequent bankruptcy. It is true, as Celotex points out, that under Rule 62(d) a stay of execution is available as a matter of right upon the posting of an *approved* supersedeas bond. Br.Opp. at 6. Petitioners point, and that of the Tenth Circuit in *Grubb*, is that approval of a supersedeas bond will no longer be a mere formality if the Fourth Circuit's ruling is maintained and followed. Judgment debtors as well as judgment creditors will suffer.

The second theme of Celotex's brief in opposition is that the petition comes from the wrong court. The question presented by petitioners, Celotex, suggests, should come to the Court not from the Fourth Circuit, but from the Eleventh Circuit upon direct appeal of the bankruptcy court's *ex parte* injunction. In other words, Celotex contends that this Court should decline review of petitioners' collateral attack on the bankruptcy court's injunction (an attack that was upheld by the district court) because petitioners did not appear in bankruptcy court to attack the injunction directly.

Celotex cites no authority for the rather extraordinary proposition that this Court will not entertain collateral attacks on a court's jurisdiction or power unless the aggrieved party first launches a direct attack. On the contrary, this Court frequently considers such collateral attacks, particularly when the aggrieved party was not a party to the proceeding or did not have a fair opportunity to challenge the order that the party is seeking to avoid. *See, e.g., Martin v. Wilks*, 490 U.S. 755 (1989). Celotex's second contention thus begs the question presented in this case. It is petitioners' position that they should not *have* to travel to bankruptcy court in Florida and initiate new proceedings in order to obtain the relief to which they are automatically entitled under the terms of the supersedeas bond and Rule 65.1.

Finally, petitioners would point out that virtually the identical issue raised in this case is under consideration by the United States Court of Appeals for the Fifth Circuit in a case styled *Edwards v. Celotex Corp.*, No. 92-1557. In that case, as in the instant case, the district court agreed with the judgment creditor that the Bankruptcy

Code does not empower a bankruptcy court to interfere with a district court's jurisdiction to allow execution on a supersedeas bond absent a final, enforceable judgment. *See* order entered in *Edwards v. Celotex Corp.*, No. 7-87-0050 (N.D.Tex. May 27, 1992), attached to this brief. The *Edwards* case was argued in the Fifth Circuit on February 18, 1993, and a decision is expected any day. Petitioners submit that the Court should either grant the petition in this case, or defer a final decision on the petition until after the Fifth Circuit issues its opinion in *Edwards*, to assure that the decisions of the Fourth and Fifth Circuits on this important issue are consistent.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS	§	
VS.	§	CIVIL ACTION
	§	NO. 7-87-0050
THE CELOTEX CORPORATION, ET AL.	§	

ORDER

(Filed May 27, 1992)

CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause.

Signed this 27th day of May, 1992.

/s/ David O. Belew
UNITED STATES
DISTRICT JUDGE